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No. 91-1496

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR
CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

ARGUMENT

In their opening briefs, petitioners and their *amici* demonstrated that (1) the Interstate Commerce Act's ("ICA") requirement that all rates be "reasonable," (2) the primary jurisdiction doctrine, and (3) this Court's decisions in *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956), and *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984), all require trial courts to stay proceedings in which insolvent carriers seek rates higher than those they originally charged and collected and to refer to the ICC the question whether the rates sought are "reasonable." *Amici* also demonstrated that neither the Bankruptcy Code nor the principles underlying the Code require a different rule.

Respondents and their *amici* address each of these issues. In the end, however, they fail adequately to explain why the ICA, the primary jurisdiction doctrine, this Court's decisions, or the Bankruptcy Code requires petitioners to pay the higher rates that respondents seek prior to the ICC having an opportunity to determine the reasonableness of those rates. They fail, in short, to explain why petitioners, who paid the rates respondent CME charged at the time of shipment, and who never would have shipped goods at higher rates at that time, should now pay *additional* monies, with little or no chance ever of obtaining complete reparations, before the ICC determines whether the rates on file were statutorily "reasonable."[1]

1. Petitioners and their *amici* demonstrated that the ICA's core requirement that all rates must be "reasonable" requires that a shipper be permitted to raise the defense that the filed rates are unreasonable in an action by a carrier to collect additional fees. Brief of Petitioners ("Pet.") 8; Brief of *Amici* National Industrial Transportation League *et al.* ("NITL") 11-14; Brief of *Amici* United States and the Interstate Commerce Commission ("ICC") 16-18. Specifically, they demonstrated that the ICA's fundamental requirement that rates must be "reasonable" should be enforced first where, as here,

[1] At the outset, it is important to note that cases such as this do not, as respondents and their *amici* intimate, involve defenseless small carriers driven to bankruptcy by powerful shipping interests. *Amicus* P*I*E, for example, was "one of the nation's largest motor carriers" with "annual operating revenues of $500,000,000" and its "customer base was more than 300,000 shippers and receivers of general commodities." Brief of *Amicus* Lloyd T. Whitaker as Trustee for the Estate of Olympia Holding Corporation f/k/a P*I*E Nationwide, Inc. ("P*I*E") 3. Similarly, *amicus* Transcon was a "major motor common carrier with annual revenues in excess of $200 million." Brief of Leonard L. Gumport, Trustee of the Bankruptcy Estate of Transcon Lines ("Transcon") 1. And *amicus* American Freight System and its affiliates had "annual revenues of approximately 500 million." Brief of *Amicus* American Freight System, Inc. ("Am. Freight") 2.

the carrier charged and collected a rate substantially lower than the rate on file and the shipper cannot obtain a complete remedy, either because it is time-barred from seeking reparations or because the carrier most likely will be unable to pay reparations if ordered.[2]

Respondents and their *amici* address this argument obliquely. *First*, while conceding—as they must—that the statute requires rates to be "reasonable," they contend that the statute provides only two mechanisms for shippers to enforce this crucial requirement: 49 U.S.C. § 10708, which permits shippers to challenge the reasonableness of filed rates before they become effective, and 49 U.S.C. § 11705(b), which authorizes shippers to seek reparations after they have paid filed rates that they believe unreasonable. Brief for Respondents ("Opp.") 16-17; Brief of *Amicus* American Freight System, Inc. ("Am. Freight") 13; Brief of *Amicus* Lloyd T. Whitaker as Trustee for the Estate of Olympia Holding Corporation f/k/a P*I*E Nationwide, Inc. ("P*I*E") 8. Accordingly, they argue that shippers cannot, under any circumstances, enforce the statute's reasonableness requirement by way of a *defense*.

[2] Citing *Maislin Industries U.S., Inc.* v. *Primary Steel Inc.*, 110 S. Ct. 2759, 2769 (1990), respondents and their *amici* maintain, with mantra-like insistence, that the filed rate requirement is "utterly central" to the Act. *See* Brief for Respondents ("Opp.") 42; Transcon 4, 8, 9, 11, 12, 13. Constant repetition of this quotation is no substitute for sound analysis. While holding that the filed rate requirement is central to the ICA, this Court in *Maislin* also emphasized the critical importance of the Act's reasonableness requirement, and did not address the question of timing presented by this case. 110 S. Ct. at 2767 ("the filed rate is not enforceable if the ICC finds the rate to be unreasonable"). This Court's emphasis on "reasonableness" is not only required by the statute, but also is supported by sound policy considerations. The reasonableness requirement protects all shippers and consumers from the expense and economic inefficiency of unreasonably high rates. By contrast, the filed rate requirement as applied here principally protects inefficient carriers.

To support this claim, respondents and their *amici* argue that in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), this Court held that shippers could neither sue motor carriers for reparations nor raise the reasonableness defense in undercharge actions by motor carriers. Opp. 32-34. They then assert that when Congress amended the ICA in 1965 it legislatively overruled this decision only with respect to reparations. *Id.* at 34. Specifically, relying on the legislative history of the 1965 amendment, they argue that Congress intended to provide a cause of action for reparations, but that it did not intend to make the reasonableness defense available to shippers. *Id.* at 34-36.

Respondents' understanding of the legislative response to *T.I.M.E.* is erroneous. In *T.I.M.E.*, this Court held that, under the ICA as it was then written, a shipper sued for undercharges by a motor carrier could not raise the defense that the filed rates were unreasonable because the Act did not provide shippers with *any* post-shipment mechanism to enforce the reasonableness provision against motor carriers. Specifically, this Court held that, in contrast to the rights that shippers enjoyed with respect to rail and water carriers, the ICA did not permit shippers to seek reparations from motor carriers. 359 U.S. at 470. Throughout the decision, this Court considered the right to seek reparations and the right to raise the reasonableness defense as inextricably intertwined rights. See *id.* ("Congress did not intend to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, *or to enable them to assert 'unreasonableness' as a defense* in carrier suits to recover applicable tariff rates") (emphasis added); *id.* at 472 ("if a shipper has a 'justiciable legal right' to recover *or resist* past motor carrier charges . . .") (emphasis added).

In response, Congress overruled the holding in *T.I.M.E.* and authorized shippers to challenge the reasonableness of past motor carrier rates. Specifically, the legislative history of the 1965 amendment makes clear that Con-

gress amended the Act to "restore a procedure formerly available to shippers which was set aside by the Supreme Court in . . . the *T.I.M.E.* case." H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2923, 2931. Respondents point to nothing, and there is nothing, in this legislative history to suggest that Congress intended to authorize shippers to challenge the reasonableness of past rates in an action for reparations but to preclude them from raising the issue of rate reasonableness as a defense when sued for undercharges.[3]

Second, respondents suggest broadly that the referral procedure advocated by petitioners is not only not mandated by the ICA but also that it threatens to undermine entirely the ICA's requirement that shippers pay the filed rate. Specifically, they suggest that the referral procedure would permit shippers in all instances to ship goods and to refuse to pay—at least initially—on the ground that the rate charged was unreasonably high. See Opp. 29-30 (referral rule would "foreclose *any* collection of filed rate charges from any shipper who claims rate reasonableness as a defense").[4] These fears are groundless. The referral procedure advocated by petitioners and their *amici* would permit shippers temporarily to withhold payment of the filed rate only where, as here,

[3] In any event, there is no suggestion in the legislative history that, in adopting the reparations provision in 1965, Congress intended to overrule this Court's 1956 decision in *Western Pacific*. Thus, even if Congress intended to limit shippers to an action for reparations in most instances, there is no evidence that Congress intended to close the exception to the pay-first "rule" that this Court identified in that case.

[4] *See also* Am. Freight 14 ("The procedure sought by the Petitioners and supporting *Amici* would permit non-payment of the legal rate pending a determination by the ICC of rate reasonableness"); Transcon 10 ("Under the 'filed opening bid' doctrine, the filed tariff rate would merely signify what the carrier proposed to receive as payment; the shipper would remain free at all times to object to the filed opening bid as unreasonable").

the carrier has charged and collected a rate lower than the filed rate. Referral is especially appropriate in this case, where the shipper cannot be assured of obtaining a complete remedy from the carrier that received full payment for the shipments. This procedure would not apply where carriers bill the filed rate at the time of shipment. In that situation, the shipper would be obligated to pay the filed rate. See 49 U.S.C. § 10743(a); NITL 14 n.6.

Finally, respondents and their *amici* also respond to petitioners' statutory argument by suggesting that the referral procedure frustrates the ICA's antidiscrimination norm. Opp. 29-30; Am. Freight 19. This contention is groundless. The referral procedure does not contribute to any discrimination against shippers. Under this procedure, just as under the pay-first procedure, any possible "discrimination" inherent in the rates paid will be cured when courts (in those cases in which the ICC finds the filed rates to be "reasonable") require shippers to pay undercharges plus prejudgment interest.

More fundamentally, Congress, by amending the ICA in 1980 to "promote competitive and efficient transportation services," 49 U.S.C. § 10101(a)(2), clearly expressed a preference for competition in the motor carrier industry. Pursuant to this mandate, the ICC has taken steps to foster more competitive pricing in the industry. See, *e.g.*, *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C.2d 146, 150-52 (1984) (permitting carriers to negotiate rates and file them within 24 hours). Contrary to the intimations of respondents and their *amici*, the steps taken by the ICC do not conflict with the statutory provision governing discrimination, which bars only "unreasonable" discrimination. 49 U.S.C. § 10741(b). In any event, the legality of the ICC's policies fostering competition is not before this Court.[5]

[5] Respondents also suggest that the referral rule frustrates the other principal goal of the filed rate requirement, namely to assist carriers in meeting their cash-flow expectations. Specifically, they suggest that the pay-first rule must be followed, even under the circumstances of this case, to allow carriers to meet their cash-flow expectations so that they can remain solvent (or, in the event that they are operating under Chapter 11 of the Bankruptcy Code, continue their operations). Opp. 29-30. This assertion is not true. Where carriers charge a rate lower than the filed rate, they can reasonably expect—at least in the short term—only to receive the rate they charge. And, when shippers pay the rate charged—as in this case—the carriers' cash-flow expectations are fully satisfied. Thus, the pay-first rule advocated by respondents is not necessary, under the circumstances of this case, to satisfy the ICA's concern with carriers' cash flow.

2. Petitioners and their *amici* demonstrated in their opening briefs that the primary jurisdiction doctrine independently requires that the reasonableness issue be referred to the ICC in any undercharge action in which the shipper cannot be assured of obtaining a complete remedy in an action for reparations. Specifically, petitioners and their *amici* demonstrated that unless the reasonableness issue is referred to the ICC before a shipper is required to pay the filed rate to a carrier from whom it cannot obtain reparations, the ICC will be deprived of a meaningful opportunity to pass on the reasonableness of the rates—*i.e.*, an opportunity to pass on the reasonableness of the rates at a time when a reparations order will have some practical effect. Pet. 19-20; NTL 14-17; ICC 11-16.

In response, respondents make an extraordinarily strained argument that any action by a district court to stay an undercharge action actually *undermines* the primary jurisdiction of the ICC and is prohibited by this Court's decisions prescribing the relationship between the courts and the ICC. Specifically, respondents argue that the referral rule presumes that rates are unreasonable, Opp. 15, or that it requires courts to conduct at least a preliminary inquiry into the reasonableness of rates. Opp. 25. Accordingly, they argue that this rule is inconsistent with this Court's decisions in a line of cases from *Arrow Transportation Co.* v. *Southern Pacific Ry.*,

372 U.S. 657 (1963), to *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131 (1982). Respondents claim that these cases establish a rule that trial courts may not, under any circumstances, take any action with respect to rates other than to enforce those rates. Opp. at 18-23.

Respondents' argument—that a rule designed to ensure that the ICC has a meaningful opportunity to determine rate reasonableness prevents the ICC from exercising jurisdiction over rates—is ludicrous on its face. Where carriers are insolvent or where shippers are time-barred from seeking reparations, trial courts can *only* provide the ICC with a meaningful opportunity to determine the reasonableness of the rates if they stay their own proceedings and refer the reasonableness issue to the Commission. If they do otherwise, they may, in violation of the mandate of the ICA and the ICC, force shippers to pay, and allow carriers (or their creditors) to keep, rates that are not "reasonable."

More specifically, the referral rule that petitioners advocate is not predicated on an assumption that the filed rates are unreasonable. It is predicated only on the fact that the ICA requires rates to be "reasonable" and that the primary jurisdiction doctrine requires that the ICC have an opportunity to determine whether rates are "reasonable" at a time when that determination will actually affect the outcome of the dispute between the shipper and carrier. Nor does the rule that petitioners advocate require courts to make any preliminary determination of unreasonableness. Indeed, requiring a threshold showing of merit would be a waste of judicial resources and would infringe upon the ICC's primary jurisdiction to determine rate reasonableness questions in their entirety. NITL 25.

Even more fundamentally, nothing in the cases on which respondents rely suggests that trial courts cannot refer the question whether rates filed in the past—and, in most cases, rates that are no longer effective—*were* reasonable at the time they were in effect. All the cases

that respondents cite concern only the courts' authority to enjoin rates currently in effect or scheduled to take effect and, by extension, judicial authority to compel a carrier to maintain or alter rates with future effect pending disposition of an ICC proceeding.[6] Accordingly, these cases hold only that a suspension or stay of rates *for future shipments* interferes with the ICC's primary jurisdiction over rates. Conversely, contrary to respondents' suggestion, these cases do not support the proposition that courts may never stay *their own proceedings* to provide the ICC with an opportunity to determine whether *past* rates were "reasonable." A stay to determine the reasonableness of past rates does not in any way compel a carrier to maintain or alter its rates; it simply permits orderly adjudication of the enforceability of the rate by the administrative body vested with the authority to do so.

Moreover, at least two of the cases upon which respondents rely expressly support petitioners' contention that the relationship between the courts and the ICC should be

[6] In *Arrow Transportation Co.* v. *Southern Pacific Ry.*, 372 U.S. 658, 669-70 (1963), for example, this Court held that a district court could not enjoin an automatically scheduled rate reduction, because that would require the court to consider—and pass upon—the reasonableness of the rate at issue. Similarly, in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 822 (1973), this Court held that a court could not enjoin implementation of certain rates, even though it had determined that the ICC had not articulated its reasons for approving the new rates with sufficient clarity. In *United States* v. *SCRAP*, 412 U.S. 669, 690-92 (1973), this Court, relying heavily on *Arrow*, held that a district court lacked jurisdiction to suspend a rate increase pending a final decision by the ICC on the lawfulness of the rate. In *Consolidated Rail Corp.* v. *National Ass'n of Recycling Indus., Inc.*, 449 U.S. 609, 613 (1981), as in *Wichita Board of Trade*, this Court held that the trial court did not have authority either to revoke or enjoin a rate increase even though dissatisfied with the Commission's justification for permitting the increase. Finally, in *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131 (1982), this Court held that the primary jurisdiction doctrine prohibited the courts from suspending a rate approved by the ICC, even though the approval was, in the court's view, arbitrary and capricious.

structured to do justice to parties—whether carriers or shippers—that cannot obtain a complete remedy in a subsequent reparations action. In *Burlington Northern*, the Court made clear that the carriers—in that case railroads—should receive higher rates in large measure *because* shippers could always seek reparations: "[T]he equities favor allowing the railroads to charge more than the Commission may ultimately find reasonable *because* the Act gives the shippers a right to reparations while no such protection is given to carriers" (emphasis added). Likewise, this Court made clear in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 824 (1973), that shippers were not entitled to an injunction, in part, because they could seek reparations and thus were unlikely to suffer irreparable harm. In this case, the shippers are not assured of a complete remedy if they pay first. Thus, by parity of reasoning, *Burlington Northern* and *Wichita Board of Trade*, rather than prohibiting courts from referring cases such as this to the ICC, actually require referral.

3. Petitioners and their *amici* also demonstrated in their opening briefs that this Court's decision in *Western Pacific* requires trial courts to stay undercharge proceedings and refer the question of reasonableness to the ICC in cases, such as this one, in which shippers cannot be certain of obtaining a complete remedy in a separate, sequential reparations action. Pet. 7-9; NITL 21-22; ICC 12-13, 18.[7] In response, respondents point first to an

[7] In addition, *amicus* NITL demonstrated that, under this Court's decision in *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984), the courts must defer to the ICC's choice of the most appropriate means of enforcing the statute—in this case, an opportunity to challenge the reasonableness of the rates prior to paying the filed rate. NITL 22-23. *See also* ICC 24 (ICC has discretion to craft appropriate remedies for violations of the statute). In response, *amicus* P*I*E contends that "[w]hatever the parameters of [the ICC's] implied power, it does not extend to creation of a 'remedy' that conflicts with the express non-discrimination provisions of the Code, the exclusive reparations remedy of the Act, and the filed-rate doctrine itself." P*I*E 11. This response begs the question. As demonstrated, the ICC's preferred choice of the most appropriate means of enforcing the statute does not conflict with any statutory provision, and indeed furthers the core mandate of the Act that rates charged and collected must be "reasonable." Accordingly, the remedy selected by the ICC is entitled to deference by this Court.

"unbroken" line of cases—extending over the 17-year period from 1907 to 1924—claiming that these cases establish an inviolate rule requiring shippers, in all instances, to pay first and seek reparations later. Opp. 12-16. These early cases do not help respondents' cause. As explained by *amicus* NITL, NITL 19, these cases—especially the leading case, *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913)—do not establish an absolute rule mechanically applicable in all cases, regardless of whether the carrier charged the filed rate, and regardless of the shipper's ability to obtain reparations. Indeed, in *International Coal*, unlike this case, the carrier billed and collected the filed rate, and the outcome of the dispute between the shipper and carrier did not turn on which procedure—pay-first or referral—was followed.[8]

[8] The other cases that respondents cite do not directly address the question of timing presented by this case. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907), for example, simply holds that the ICC, not the courts, is vested with the authority to determine rates and to adjudicate actions for reparations. Likewise, the principal holding in *Robinson* v. *Baltimore & Ohio R.R.*, 222 U.S. 506, 509 (1911), is that a holding by the ICC that rates are unreasonable is a prerequisite to seeking reparations in the courts. And *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247, 249 (1913), held that a court lacked jurisdiction to order reparations before the ICC had an opportunity to determine the legality of the challenged rates.

In support of this argument respondents also point to some early ICC decisions that respondents contend contradict the ICC's current position. Opp. 26-28. Like many of the court cases on which respondents rely, these early ICC decisions do not address the precise question of timing at issue here. Indeed, the more relevant ICC decision is *Glama Dress Co.* v. *Mid-South Transports, Inc.*, 335 I.C.C. 586, 588-89 (1969), in which the ICC found that it has the authority to decide rate-reasonableness issues asserted as a

Moreover, as *amicus* NITL explained, NITL 20, this Court underscored the limited applicability of the dicta in these early cases in its 1942 decision in *Crancer* v. *Lowden*, 315 U.S. 631 (1942). In that case, this Court strongly suggested that the pay-first approach was not required by the ICA, but was rather an equitable principle, applicable where, unlike this case, the carrier would be materially prejudiced by referral to the ICC and where the shipper could obtain a complete remedy following a reparations action. *Id.* at 636. Finally, and importantly, the limited applicability of the early decisions upon which respondents rely is underscored by the fact that all were decided prior to this Court's 1956 decision in *Western Pacific*. In that case, this Court made clear that referral to the ICC was required in circumstances analogous to the situation in this case *because* the shipper was barred from seeking reparations in a separate, sequential action. 352 U.S. at 62.

Respondent seeks to distinguish *Western Pacific* on the grounds that it applies only to the Government as shipper and, in any event, it was not a case about rate reasonableness. Opp. 23-24. This reading is entirely unsupported by the language of the decision itself. First, this Court did not suggest anywhere in its opinion that the Government was entitled to raise the reasonableness defense *because* the Tucker Act provided it with certain "unique" rights, including the right to set off overcharges against future payments.[9] To the contrary, in permitting

counterclaim in an enforcement action. In any event, there is no reason why the views of the ICC, the agency charged with administering the statute, cannot evolve in light of an altered Congressional mandate and changed circumstances in the industry.

[9] Respondents suggest that private shippers cannot be entitled to raise the reasonableness issue as a defense, otherwise "Congress would not have had to pass the Tucker Act to give the United States Government its 'unique right' to set off." Opp. 23 n.13. This is nonsense. Congress granted the Government, but not private shippers, the right to set off overcharges to relieve it, but not

the Government to raise the reasonableness defense and requiring referral of that defense to the ICC, this Court cited two reasons—the need to secure agency expertise and a desire to prevent the carrier from obtaining unreasonable charges "with impunity"—that fully support application of the same rule to private shippers. 352 U.S. at 71. Second, contrary to respondents' suggestion, the Court clearly considered *Western Pacific* to be a case about rate reasonableness. Indeed, in rebuffing the carriers' argument that the case merely raised issues of tariff construction, the Court expressly rejected as "artificial[]" the "distinction between the issues of tariff construction and of the reasonableness of the tariff as applied." *Id.* at 68.

Thus, properly read, *Western Pacific* plainly established the general, principled rule that referral to the ICC is required where a shipper cannot be assured of obtaining a complete remedy in a separate action for reparations. That rule governs this case and requires reversal.[10]

4. *Amicus* NITL demonstrated that no specific provision of the Bankruptcy Code governs this case because

private shippers, of the burden of filing anticipatory suits challenging the reasonableness of filed rates in every instance. *Western Pacific*, 352 U.S. at 74. This does not in any way imply that the Government did not have the right, or that private shippers do not now have the right, to raise the reasonableness defense in situations where the carrier did not charge the filed rate and now seeks to collect additional fees.

[10] In response to petitioners' *Western Pacific* argument, respondents rhetorically question why shippers should be protected against the risk of carriers' bankruptcy, while carriers must bear the risk of shippers' insolvency. Opp. 18. The answer is simple: Because shippers must pay the rate charged at the time of shipment, carriers can protect themselves against the risk of shippers' insolvency by charging the filed rate at the time they provide service. Carriers such as respondent CME that failed to charge the filed rate can also protect themselves, where necessary, by requesting that the district court or the ICC require a shipper to post a bond or place the funds sought in an escrow account. *See infra* n.14.

petitioners are not creditors of respondent CME. Nevertheless, NITL contended that the Code and common law principles underlying the Code fully support the rule permitting a shipper to defend against an undercharge claim by an insolvent carrier on the ground that the filed rates were unreasonable and to have that defense referred to the ICC. As NITL demonstrated, principles of bankruptcy law support this rule because the opposite rule would permit insolvent carriers, but not solvent ones, to retain rates that are not "reasonable," in violation of the maxim that a bankrupt entity may not obtain a "windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961). Moreover, as NITL demonstrated, the Code does *not* embrace a goal of increasing the pool of money available to creditors at all costs. Indeed, the Code generally favors setoff and recoupment of offsetting claims.

Respondents and *amici* raise two arguments with respect to the rules of bankruptcy.[11] *First*, they contend that the rule advocated by petitioners "amounts to punishing carrier[s] who can no longer afford to operate," Opp. 41, and is therefore "inconsistent with the Code's overriding policy prohibiting discrimination against a debtor," P*I*E 10. They also suggest that such "punishment" is neither "relevant" nor "rational" because "[t]he liquidation values of motor carriers' estates vary widely,"

[11] Respondents also argue that petitioners are not entitled to a setoff or to recoupment because the competing claims in this case did not arise prior to the petition for bankruptcy. Opp. 37-40. This argument reflects a misunderstanding of NITL's position. NITL quite clearly recognized that this case simply involves a claim by respondents for money and that, at this point, petitioners and respondents do not have offsetting or partially offsetting claims of any sort. Indeed, this fact forms the basis of NITL's contention that the Code does not govern this case. NITL argued only that the Code does not *require* shippers to pay first and, more generally, that it favors offsetting mutual claims.

id. at 11, and "assets *may* be available" to pay reparations. Brief of *Amicus* International Brotherhood of Teamsters ("Teamsters") 16 (emphasis added).

These contentions are misleading. Admittedly, the Code does prohibit both governmental units and private employers from engaging in certain discrete forms of discrimination against debtors. For example, governments may not deny a license, a permit or a charter to a debtor, and employers may not discriminate against a debtor with respect to employment. 11 U.S.C. § 525. The Code, however, does not prohibit all forms of differential treatment of bankrupt entities, particularly differential treatment predicated on the debtor's current or future financial stability. See, *e.g.*, H.R. Rep. No. 595, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6126 ("the prohibition [of Section 525] does not extend so far as to prohibit . . . the examination of prospective financial condition"); *In re Norton*, 867 F.2d 313, 316-17 (6th Cir. 1989); *In re Richardson*, 27 B.R. 560, 564 (E.D. Pa. 1982) ("Unquestionably, Section 525 . . . can not be interpreted so as to preclude [an entity] from making reasonable inquiry into the future financial responsibility" of the debtor).

In any event, the referral procedure advocated in this case is not, in any meaningful sense, punitive. Under this procedure, insolvent carriers, like solvent carriers, will ultimately receive all that they are entitled to under the statute—"reasonable" rates. And, under this procedure, but not the pay-first procedure advocated by respondents, bankrupt carriers, like solvent ones, will be precluded from retaining any monies to which they are not legally entitled.

Finally, the referral procedure is not discriminatory. It should govern *all* cases in which the shipper cannot be assured of a complete remedy, either because it is time-barred from seeking reparations or because the carrier—whether solvent or insolvent—is unlikely to be able to pay full reparations. Moreover, to the extent that it

disproportionately affects insolvent carriers, this differential effect is justified by the entirely rational assumption that insolvent carriers are, as a general matter, less likely than solvent carriers to pay full reparations if the rates they seek to enforce are deemed unreasonable by the ICC. Thus, while some insolvent carriers continue to operate under the protection of Chapter 11, and while some insolvent carriers might theoretically be able fully to repay all of their creditors including those who are unsecured, it is plainly both "relevant" and "rational" to treat carriers that are unlikely to be able to pay reparations differently when establishing a rule governing the order of payment of alleged undercharges and the repayment of reparations.

Second, respondents and their *amici* argue that the delay in payment associated with the referral procedure is unwarranted because "bankrupt carriers are badly in need of funds to pay creditors," Opp. 41, and because some Chapter 11 debtors will be forced to liquidate their assets, P*I*E 12. Indeed, *amicus* International Brotherhood of Teamsters contends that this delay would interfere with bankruptcy trustees' duties to "marshal assets" and "maximize the value of the estate for creditors." Teamsters 14.

To be sure, the referral procedure will delay the transfer of monies from shippers to carriers in those cases in which the ICC ultimately determines that the filed rates were not unreasonable. Such delay, however, is entirely legitimate. Insolvent carriers such as CME are ordinary claimants, seeking judgments against entities over which the bankruptcy courts have no jurisdiction, and they are not entitled to prevail on their claims if the rates they filed were not "reasonable." As such, they, like all other civil claimants, must await the outcome of the claims process, including referral of the reasonableness issue to the ICC, before they can collect the monies to which they lay claim. Cf. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (bankruptcy courts constitutionally prohibited from exercising jurisdiction over matters unrelated to "the restructuring of debtor-creditor relations which is at the core of the federal bankruptcy power"); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 63-64 (1989) (delay in bankruptcy proceedings must be tolerated where Constitution requires that certain procedures be followed).[12]

5. Several of respondents' *amici* suggest that it is unnecessary to refer the reasonableness issue to the ICC in cases such as this one because both district and bankruptcy courts have broad discretion to establish mechanisms to protect any monies that shippers pay carriers in those instances in which the courts believe that carriers may not be able to pay reparations. Specifically, *amicus* International Brotherhood of Teamsters suggests that district courts can "hold [the undercharges] pending a determination of rate reasonableness by the ICC," Teamsters 16, and *amicus* P*I*E suggests that a bankruptcy court could "require the trustee to take steps to preserve shipper payments of the filed rate, when received, pending final outcome of any reparations action the shipper initiates." P*I*E 17.[13]

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[12] The argument that the *creditors* of insolvent carriers need, and would receive promptly, any additional funds paid by shippers to carriers heavily underscores the reasonableness of distinguishing between carriers that are in a position to pay reparations and those that are not when establishing the rules governing payment and reparations in cases such as this one. Indeed, it is highly inconsistent for respondents and their *amici* to make clear that any monies collected will be disbursed promptly to creditors and simultaneously to assert that funds will be available to pay reparations.

[13] Similarly, *amicus* Transcon, citing Rule 67 of the Federal Rules of Civil Procedure, suggests that shippers can "fully preserve [their] ability to recover reparations by paying the filed rate into [a] registry of the court." Transcon 6. This suggestion is odd. "Rule 67 is a rather unimportant rule," the purpose of which is to relieve depositors of responsibility for a fund in dispute such as in an interpleader action. C. Wright & A. Miller, 12 Federal Practice & Procedure § 2991, at 50-51 (1973). Thus, there is

These arguments make little sense. Payment of funds into court registeries or escrow accounts will not facilitate the adjudication of the reasonableness defense, cure carriers' cash flow problems, or provide relief to "needy" creditors.[14] More important, shippers are statutorily *entitled* to retain any monies that carriers claim pursuant to unreasonable rates. Accordingly, their right to retain these monies or to be assured of reparations should not be subject to the discretion of the courts. Finally, many shippers may themselves be bankrupted if they are required to pay into escrow the rates claimed by carriers—which far exceed the rates at which the shippers would have agreed to ship goods. Absent some evidence in the statute that such a result is required, it makes no sense at all to impose this obligation.

* * * *

In sum, the ICA requires both that rates be "reasonable" and that carriers charge, and shippers pay, the filed rates. A well-established rule requires shippers to pay the filed rate first and seek reparations later when carriers demand the filed rate at the time of delivery. However, no cases hold that where, as here, a carrier willingly charged and collected a rate substantially lower than the filed rate, the filed rate must be tendered as the cost of admission to a hearing before the ICC to determine whether the filed rate is "reasonable." In such cases, particularly where the shipper cannot reasonably be assured of obtaining a complete remedy, it is antithetical to the ICA's requirement that all rates be "reasonable," to the primary jurisdiction doctrine, to this Court's decisions construing the Act, and to the principles of public policy embodied in the Act, to require shippers to pay carriers additional monies before they have an opportunity to have the reasonableness of the filed rates determined by the ICC.

little or no precedent for its use in situations like the one in this case.

[14] Payment into such accounts will, of course, guarantee that carriers get paid if the ICC determines that the filed rates were in fact reasonable. It is not necessary, however, to establish such accounts in all cases. In the unusual situation where a carrier has reason to believe that a shipper will not be able to pay a judgment, then it can request that the court or ICC establish an escrow account. Certainly the ICC has the authority pursuant to its equitable powers to establish such accounts. *Cf. ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984).

CONCLUSION

For the foregoing reasons, and those stated in the opening briefs of petitioners and their *amici*, the decision of the court of appeals should be reversed.

Respectfully submitted,

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